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No.

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In The Supreme Court of the United States

OCTOBER TERM, 1982

~~RASHID, ROLA & RITA KARAM, BY AND THROUGH THEIR FATHER AND NEXT BEST FRIEND, MAURICE R. KARAM AND~~ et al,
MAURICE R. KARAM, PETITIONERS,

v.

ALLSTATE INSURANCE COMPANY, et al
~~BUCKEYE UNION INSURANCE COMPANY AND MAURICE R. KARAM, ADMINISTRATOR OF THE ESTATE OF ROSE KARAM.~~

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF OHIO

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QUESTION PRESENTED

Whether the Supreme Court of the State of Ohio must be composed of at least six (6) elected justices under the Ohio Constitution in order to constitute a competent judicial tribunal in accordance with the due process guarantee of the United States Constitution.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio (Appendix A, infra, 2a through 37a) is reported at 70 Ohio St.2d 227. The denial of the Motion for Rehearing (Appendix A, infra, 38a) is not reported. The Decision and Entry of the Court of Appeals for Franklin County, Ohio (Appendix B, infra, 39a through 49a) is not reported. The Decision and Entry of the Court of Common Pleas for Franklin County, Ohio (Appendix C, infra, 50a through 53a) is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio (Appendix A, infra, 1a) was entered on June 23,

1982, and the Motion for Rehearing (Appendix A, infra, 38a) was denied on July 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) in that petitioner is specially claiming the right of due process under the Constitution of the United States of America.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in Appendix D, infra, 54a and 55a.

STATEMENT

On February 16, 1982 Petitioners' cause was submitted to the Ohio Supreme Court for oral argument. At that time absent were Chief Justice Frank Celebrezze and Justice William Brown. In their stead sat Judge Stephenson, of

the Fourth Appellate District of Ohio, for Chief Justice Celebrezze and Judge Victor of the Ninth Appellate District, for Justice William Brown. Neither of the absent Justices had disqualified themselves.

Petitioner, on July 6, 1982, filed a Motion for Rehearing contending that the Court as thus constituted was not a competent tribunal since the Ohio State Constitution, which is the sole source of authority in Ohio for judicial tribunals, allows for the substitution of only one of the justices who were elected to the Ohio State Supreme Court with a judge from the lower courts. This Motion for Rehearing was summarily denied without hearing or opinion on

July 19, 1982. Because the Motion for Rehearing was denied the specific federal question involved, that of the guarantee of due process of law, has not been able to be specifically addressed in the proceedings of State Courts. This constitutional right of due process, however, based on the holding of Glidden Co. v. Zdanok, 370 U.S. 530, 536, 82 S. Ct. 1459 1465 (1962), is being timely and properly raised.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari to the Supreme Court of the State of Ohio should be granted because the denial of the Motion for Rehearing of the Ohio State Supreme Court

conflicts with the holding of the federal courts, specifically Sas v. State of Maryland, 334 F.2d 506, 515 (1964), where it was held that:

> "With respect to state action repeated decisions of the Supreme Court have put it beyond the range of further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the states any particular mode or form of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. [Citing] Frank v. Mangum, 237 U.S. 309, 340 35 S. Ct. 582." [Emphasis Supplied].

Petitioners have been denied due process because their cause of action was not heard before a competent tribunal. The Ohio State Supreme Court as constituted was not a competent tribunal because it contained two

substitute judges rather than only one, as allowed by the Ohio Constitution. Before going further it is necessary to show that the justices whose constitutional authority to act is being challenged are "substitute" and not "de facto" judges.

In their most recent pronouncement on this subject the Ohio Supreme Court stated that a de facto judge is one who:

> "Enters upon and performs the duty of his office with the acquiescence of the people and the public authorities and has the reputation of being the officer [sic] he assumes to be and is dealt with as such" State v. Staten, 25 Ohio St.2d 107 (1971), point 3 of the syllabus of the court.

Although the above definition would seem to emcompass the two substitute judges, it is inapplicable for the very reason that they are substitute judges

and do not otherwise claim title to the office. In 15 Ohio Jurisprudence 3rd, CIVIL SERVANTS §303, it is stated that:

> "It is evident that two different persons cannot, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law [citing Davies v. State, 11 OCC W.S. 209; State v. Corey, 2 O Dec. Rep. 669, aff'd. 16 OS 17; and Knorr v. Board of Education, 8 O Dec. Rep. 672]. Hence, if the officer de jure is occupying the office there is no room for an officer de facto."

In the instant case, there are de jure justices and thus there can be no de facto justices, only substitute justices. This conclusion is shared by Annot. 144 ALR 1207, at page 1214, where it states:

> "The necessities upon which the general rule that the title or authority of a de facto judge

> cannot be challenged by a litigant in litigation before him are not present . . . where one other than the regular judge presides, inasmuch as in such case, there is no profession of right to the particular judgship or authority to exercise the function thereof, except by special election or appointment. Accordingly, upon this theory, cases of special, substitute or pro term judges have been recognized as exceptions to the general rule . . . and objections to their authority may be made in the court in which the challenged judge sits . . . and, if overruled, maybe assigned as error upon appeal."

In 46 Am. Jur.2d JUDGES §261, it is stated that:

> "However, if the record affirmatively shows that the judge deciding the case was neither a de jure or de facto officer [but rather a substitute judge], a litigant adversely affected may object for the first time on appeal. A challenge on constitutional grounds to the authority of a substitute trial judge may be

raised for the first time on appeal." [Citing Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459 (1962).]

In Glidden, the authority of the judge was challenged for the first time in the U.S. Supreme Court. Because the challenge was on direct review and not by way of a collateral attack on the judgment there was no justification to apply the rule forbidding challenges to the authority of the judge which is founded:

> "[U]pon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. . . . The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. . . . It should be examinable on direct review, where its

> consideration encounters none of the objections associated with the principle of res judicata, that there must be an end to litigation." Glidden, 370 U.S. at 536, 82 S. Ct. at 1465.

Therefore, the authority of these two justices may be challenged by Petitioner on appeal since the "alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants" Id. That substitute justices must be appointed in accordance with the source of all judicial authority, the Constitution, is a universally accepted legal principle.

In 21 Corpus Juris Secondum COURTS §120 (p. 180) it is stated:

"The constitution, as the dispenser of the sovereign power of a state, is the ultimate source of the judicial power of courts. To it all courts owe their existence and jurisdiction. Unless a court's authority emanates from the supreme power of the state, the court itselt is an absolute nullity, and all its proceedings are utterly void. No person can, in the absence of authority at law, create a court and preside over the same as judge; nor can any judge hold a court which is unconstitutional in its organization."

More specifically, in 48A Corpus Juris Secondum JUDGES §166 it states:

"In order for an individual to act as a special or substitute judge under the law, his selection must comply with the provisions of the law."

In 48A Corpus Juris Secondum JUDGES §170 it states:

"Where the selection of a special judge is not in accordance with law, there is no judge and the entire proceeding is a nullity."

In the instance case, the court before which Petitioners' claim was heard was not a competent tribunal and, therefore, their due process rights were violated because the court contained two substitute judges while the Ohio State Constitution only permits the appointment of a single substitute justice.

Article IV, Section 2, of the Ohio State Constitution provides:

> "[The] supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of the longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or

causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place instead of the absent judge. . . ." Emphasis supplied.

The plain language of Article IV, Section 2, provides that no more than one judge shall be replaced by an appellate judge during the hearing of a cause. The language of the section is singular. The nouns are singular. This construction is consistent with the demands of the democratic process whereby supreme court justices are elected by the general populous. They serve subject to removal through vote. Article IV, Section 2 represents a reasoned decision that permitting one appellate judge to sit in the stead of an absent justice serves judicial

effeciency. To permit more than one to sit usurps the democratic process which guarantees responsive government.

It is clear that in Ohio only one substitute justice may be constitutionally appointed. If more than one is appointed then the body is not a competent judicial tribunal as guaranteed by the due process clause of the United States Constitution. However, in Glidden, 370 U.S. at 536, 82 S. Ct. at 1465, the ability of the United States Supreme Court to consider the challenge to the judge's authority rested in part on their determination that "the challenge is based upon nonfrivolous constitutional grounds". In the instant case the alleged

violation of Petitioners' due process rights guaranteed by federal constitution is nonfrivolous, as shown by Ohio case law.

In Hilton v. State, ex rel Bell, 108 Ohio St. 233, 238 (1923) the Ohio State Supreme Court stated that "[n]ot only does the express language of the judicial article of the Constitution, but its entire spirit, breathe antagonism to an appointed judiciary". In State, ex rel Cherrington v. Hutsinpiller, 112 Ohio St. 468, 473 (1925), it was stated that a "power [the judicial power] so extraordinary and vital should not rest upon any less foundation than express grant or clear and necessary implication. . . ." Hutsinpiller, 112 Ohio St. at 475,

concluded that "[e]xcept, therefore, for the purpose of filling vacancies, as provided by law, there is no legal or constitutional power by which a judge may be appointed in this state." [Emphasis supplied].

In Ohio, the due process right to have a claim heard by a competent tribunal of elected justices is taken most seriously. It is manifest that Petitioners did not enjoy that right.

There is one Ohio case, State, ex rel Stanley v. Cook, 146 Ohio St. 348 (1946) in which two supreme court justices were replaced by two appellate court judges. Of course, this simple fact does not make the practice constitutional. Further, the case is

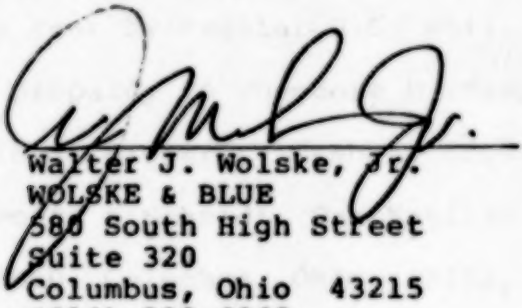
clearly distinguishable from the case at bar. First, the justices in that case had disqualified themselves. Thus, if the case was to be heard by a seven justice court without first holding an election the two justices had to be replaced with substitutes. In the case at bar, since the justices had not disqualified themselves, all that needed be done to have had the cause heard by the seven elected justices is to have waited until the reasons for the absence of the two justices ceased to exist, since illness, etc., is not permanent as is disqualification. Second, in Stanley, counsel for both parties agreed that the case could be heard by the court as

thus constituted with two substitute justices. In the case at bar, there was no such agreement and Petitioners objected to the competency of the court to act with two substitute justices at the earliest possible time, i.e., in their Motion for Rehearing. Stanley, in fact, supports the assertion that only one justice (absent disqualification) may constitutionally be replaced by a substitute. Why else would it have been necessary to obtain the consent of the parties to the action except to estop them from objecting on appeal?

In conclusion, then, the two justices were not de facto justices but were only substitute judges since the

offices were already filled with de jure justices. Because the justices are not de facto, their authority may be challenged on appeal. Even if this Court should decide that Petitioners' objections were not raised below (even though made at the earliest possible moment in their Motion for Rehearing), this is no bar to an appeal on this issue since Petitioners are alleging the violation of a basic constitutional right, that of due process. Petitioners' due process rights were violated because their case was not heard by a competent tribunal of elected justices since it contained more than one appointed substitute judge in violation of Article IV,

Section 2 of the Ohio State Constitution. Finally, Petitioners' claim is not frivolous given the degree of commitment to an elected judiciary in the State of Ohio.



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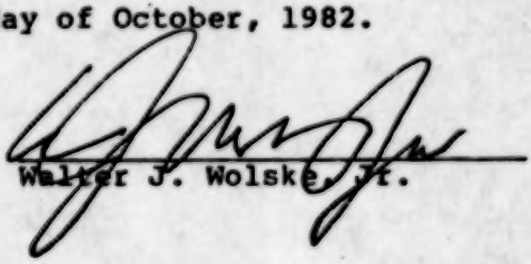
CERTIFICATE OF SERVICE

I hereby certify, as a member of the Bar of this Court, that a true copy of the Petition for Writ of Certiorari to the Supreme Court of the State of Ohio was sent by regular U.S. mail, postage prepaid, to Theodore D. Sawyer and David J. Richards, Crabbe, Brown, Jones, Potts & Schmidt, One Nationwide Plaza, 2500, Columbus, Ohio 43215, this 14 day of October, 1982.



Walter J. Wolske, Jr.

AFFIDAVIT OF MAILING PROCESS

STATE OF OHIO:
COUNTY OF FRANKLIN, SS:

I, Walter J. Wolske, Jr., after first being duly sworn, deposes and states that to my knowledge the Petition of Writ of Certiorari to the Supreme Court of the State of Ohio was deposited in a United States Post Office with first-class postage prepaid and properly addressed to the Clerk of this Court on October 14, 1982 and that therefore this document should be deemed timely filed pursuant to Rule 28.2 of the United States Supreme Court Rules.

Walter J. Wolske, Jr.

Sworn to before me and subscribed in my presence this 14th day of October, 1982.

Notary Public

Gerald S. Lessenberry, Attorney At Law
NOTARY PUBLIC — STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.